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COURT OF CRIMINAL APPEALS
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No. PD-

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
9/23/2020
DEANA WILLIAMSON, CLERK

STOYAN K. ANASTASSOV, Appellant

v.

THE STATE OF TEXAS Appellee

Appeal from Dallas County
No. 05-19-00397-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Stoyan K. Anastassov.

* The trial judge was the Honorable Brandon Birmingham, 292nd Judicial District Court, Dallas County.

* Counsel for the State at trial were Marissa Mouton and Brandie Wade, 133 LB 19 Frank Crowley Courts Building, N. Riverfront Blvd., Dallas, Texas 75207.

* Counsel for the State on appeal was Kimberly Duncan, 133 LB 19 Frank Crowley Courts Building, N. Riverfront Blvd., Dallas, Texas 75207.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellant at trial were Ashkan Mehryari, 212 West Spring Valley Road, Richardson, Texas 75081, and Tom Pappas, 900 Jackson Street, Suite 330, Dallas, Texas 75202.

* Counsel for Appellant on appeal was Michael Mowla, P.O. Box 868, Cedar Hill, Texas 75106.

INDEX OF AUTHORITIES

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No. PD-

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

STOYAN K. ANASTASSOV, Appellant

v.

THE STATE OF TEXAS Appellee

Appeal from Dallas County
No. 05-19-00397-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Concurrent terms of confinement are served at the same time. Concurrent fines should be treated the same by being discharged concurrently. Therefore, here, the lower court erred to view the two concurrent fines as consecutive and then striking the second lawfully imposed fine from the judgment in Case No. F15-50350-V.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument. The operation of lawful concurrent sentencing is well-established. Here, the lower court just misapplied it to concurrent fines.

STATEMENT OF THE CASE

Appellant was convicted twice in the same jury trial of indecency with a child by contact. F15-50349-V 1 CR 270-71; F15-50350-CR 1 CR 272-73. He was sentenced to nine years' imprisonment on one count and three years' on the other. F15-50349-V 1 CR 270-71 (9 years); F15-50350-CR 1 CR 272-73 (3 years). A $10,000 fine was assessed in each case. F15-50349-V 1 CR 270-71; F15-50350-CR 1 CR 272-73. Observing that the sentences were concurrent, the court of appeals struck one $10,000 fine (Case No. F15-50350-V) because "the trial court could not assess multiple fines." *Ananstassov v. State*, No. 05-19-00397-CR, 2020 WL 4669880, at *10-11 (Tex. App.—Dallas Aug. 12, 2020) (not designated for publication).

STATEMENT OF PROCEDURAL HISTORY

Relevant here, the court of appeals struck one of two concurrent $10,000 fines. *Id.* The State was granted an extension to file its Petition by October 12, 2020.

GROUND FOR REVIEW

Should concurrent fines be discharged concurrently like concurrent terms of confinement?

ARGUMENT

The court of appeals' striking of the $10,000 fine in Case No. F15-50350-V conflicts with the general principles of concurrent sentencing, wrongly eliminates part of a lawfully imposed sentence, and could result in the unjust discharge of the $10,000 fine altogether. This issue should be settled by this Court because the lower courts have disagreed on how concurrent fines are treated.

1. Concurrent Fines Should be Treated Like Concurrent Confinement Terms.

Concurrent sentencing means that the sentences will discharge at the same time. *Nguyen v. State*, 359 S.W.3d 636, 643 (Tex. Crim. App. 2012). Concurrent sentencing applies to terms of confinement[1] and fines. *State v. Crook*, 248 S.W.3d 172, 176-77 (Tex. Crim. App. 2008) (construing provision in TEX. PENAL CODE § 3.03(a)); *see also Rhodes v. State*, 240 S.W.3d 882, 888 (Tex. Crim. App. 2007) (judgment can contain two or more sentencing elements like imprisonment and a fine).

The same-time aspect for concurrent confinement terms should apply equally

[1] As a general rule, concurrent sentences of imprisonment begin to run on the day the sentences are pronounced. TEX. CODE CRIM. PROC. art. 42.09(a).

to concurrent fines. This means that, when the sentences are concurrent, multiple fines should be treated as a unitary fine. So here, the two $10,000 fines should be treated as a single $10,000 fine so that only $10,000 in total is ever due and collected.[2] The court of appeals's striking of the fine in Case No. F15-50350-V violated the general principles applicable to concurrent sentencing. Indeed, the court's reasoning relies on the faulty premise that concurrent fines are actually consecutive when the record clearly indicates otherwise. Both judgments plainly state that the sentence in each case shall run "CONCURRENT." F15-50349-V 1 CR 270; F15-50350-V 1 CR 272.

2. Striking a Lawfully Imposed Fine is Improper.

Further, the striking of one fine contravenes with the fact that the punishment was assessed within the applicable range for the offense. Appellant was convicted of the second-degree-felony offenses of indecency-by-contact. TEX. PENAL CODE § 21.11(a)(1), (d). The second-degree-felony punishment range was a term of imprisonment up to twenty years but not less than two and, in addition to imprisonment, though not mandatory, a fine not to exceed $10,000. TEX. PENAL CODE § 12.33. The $10,000 fine for each of Appellant's convictions was authorized

[2] The same rule would apply in cases in which the fines differed. In that instance, the greater fine amount would control because the lesser would be subsumed by the greater.

by statute. The court of appeals therefore struck a lawful punishment from the judgment in trial court Case No. F15-50350-V. A court of appeals does not have the authority to delete a lawful sentence.

3. Unintended Consequence: Potential for an Unjust Result from the Striking of a Lawful Fine.

The court of appeals' striking of the fine has the potential to yield an unjust result. If, in the future, Appellant's conviction or sentence in the other case (Case No. F15-50349-V) is vacated, Appellant would no longer be obligated to pay any fine (unless it was re-imposed by another sentencing authority). Appellant would be unjustly discharged from the duty of paying the twice lawfully imposed $10,000. This result is not what was intended when his sentences were originally imposed.

4. This Court Needs to Settle the Disagreement Among Lower Courts.

Courts of appeals differ about how to treat concurrent fines. The El Paso Court of Appeals held that deletion of multiple concurrent fines was proper because, despite *Crook*'s clear application to multiple terms of confinement, "paying a fine concurrently is perhaps not as intuitive a concept" and therefore "'it is always probable that something improbable will happen.'" *Aldana v. State*, No. 08-13-00243-CR, 2015 WL 2344023, at *2 (Tex. App.—El Paso May 14, 2015, pet. ref'd) (not designated for publication) (quoting *Warren v. Purtell*, 63 Ga. 428, 430 (1879)).

The Amarillo Court of Appeals applied the striking-as-to-the-judgment remedy

to cure inaccuracies in the bills of costs. *Habib v. State*, 431 S.W.3d 737, 742 (Tex. App.—Amarillo 2014, pet. ref'd). There, even though the *judgments* showed concurrent fines, each separate *bill of costs* reflected a fine. *Id*. The First District Court of Appeals applied the same remedy to the same factual scenario in *Williams v. State*.[3] 495 S.W.3d 583, 590-91 (Tex. App.—Houston [1st Dist.] 2016, pet. dism'd as improv. granted).

Conversely, some jurisdictions retain the multiple fines but still address concurrent sentencing. The Austin Court of Appeals recognized that multiple fines can run concurrently, and to ensure that the judgments' mandates would be honored and to avoid double billing—the El Paso Court's concern—it modified the judgments to specifically state the fines run concurrently. *Alexander v. State*, Nos. 03-16-00074-CR & 03-16-00075-CR, 2016 WL 5363735, at *1 (Tex. App. Austin—Sept. 22, 2016, pet ref'd) (not designated for publication). The San Antonio Court of Appeals reached a similar decision when the trial court assessed a fine in each case; it reformed the judgments to show that the fines are to run concurrently. *Abraham v. State*, Nos. 04-13-00180-CR, 04-13-00181-CR, & 04-13-00182-CR, 2014 WL 2917378, at *2 (Tex. App.—San Antonio June 25, 2014, no pet.) (not designated for

[3] The First Court followed *Williams* in *Beard v. State*, No. 01-18-00440-CR, 2019 WL 3484084, at 13 (Tex. App.—Houston [1st Dist.] Aug. 1, 2019, pet. ref'd) (not designated for publication).

publication).

This Court should grant review and settle the issue so there is a clear uniform rule that can be applied by all the courts of appeals. *See* TEX. R. APP. P. 66.3(a).

PRAYER FOR RELIEF

The State prays that the Court of Criminal Appeals grant its Petition, reverse the court of appeals' striking of the fine, and reinstate the fine in Case No. F15-50350-V.

Respectfully submitted,

/s/ Stacey M. Soule
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 969 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Petition for Discretionary Review has been served on September 22, 2020, *via* email or certified electronic service provider to:

Hon. Kimberly Duncan
Kimberly.Duncan@dallascounty.org

Hon. Michael Mowla
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/s/ Stacey M. Soule
State Prosecuting Attorney

APPENDIX

(Court of Appeals' Opinion)

2020 WL 4669880
Only the Westlaw citation
is currently available.

SEE TX R RAP RULE 47.2
FOR DESIGNATION AND
SIGNING OF OPINIONS.

Do Not Publish Tex. R. App. P. 47
Court of Appeals of Texas, Dallas.

Stoyan K. ANASTASSOV, Appellant
v.
The STATE of Texas, Appellee

No. 05-19-00396-CR
and No. 05-19-00397-CR
|
Opinion Filed August 12, 2020

On Appeal from the 292nd Judicial District Court, Dallas County, Texas, Trial Court Cause Nos. F-1550349-V and F-1550350-V

Attorneys and Law Firms

John Creuzot, Dallas, Kimberly Duncan, for Appellee.

Michael Mowla, Duncanville, for Appellant.

Before Justices Schenck, Molberg, and Nowell

MEMORANDUM OPINION

Opinion by Justice Molberg

***1** A jury convicted appellant of two charges of indecency with a child by sexual contact and sentenced him to confinement in the Texas Department of Criminal Justice's Institutional Division for nine years on one charge, three years on the other, and a $10,000 fine in each case. Appellant argues the trial court erred in allowing evidence of extraneous offenses or bad acts by appellant and alleges charge error regarding that evidence. The State also raises a cross-issue. For the reasons that follow, we affirm the judgments as modified.

Background

On May 27, 2015, a grand jury returned two indictments charging appellant, a professional tennis coach, with indecency with a child by sexual contact, for alleged contact with S.S., one of his female students. Both indictments alleged that, with the intent to arouse and gratify his sexual desire, appellant unlawfully engaged in sexual contact with S.S., a child younger than seventeen years of age who was not then his spouse, by contacting S.S.'s genitalia (Case No. F15-50349-V) and her breast (Case No. F15-50350-V) with his hand.[1]

1 Our Case No. 05-19-00396-CR involves the indictment in district court Case No. F15-50349-V, and our Case No. 05-19-00397-CR involves the indictment in district court Case No. F15-50350-V.

The State later moved to amend both indictments, seeking to change the date of the offenses charged in each indictment to on or about December 24, 2011. The trial court granted those motions. Appellant pleaded not guilty to both charges and elected to have the jury assess punishment. Both charges were tried together in a single trial beginning February 19, 2019.[2]

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2 Although the record contains no indication that the State filed a notice under penal code section 3.02(b) to prosecute the two charges in a single proceeding, the record also lacks any indication that appellant objected to the single proceeding. *See* Tex. Penal Code § 3.02(b); *Cervantes v. State*, 815 S.W.2d 569, 571 (Tex. Crim. App. 1991) (en banc) (while there may be a right to separate trials, the right can be waived through consent or failure to object to single trial for separate indictments).

Nine days, eighteen witnesses, and roughly seventy exhibits later, the jury found appellant guilty of both offenses as charged in the amended indictments. During the guilt/innocence phase of trial, in addition to other witnesses, the jury heard from S.S. and from appellant, who waived his right not to testify. During the State's case-in-chief, S.S. testified that on Christmas Eve in 2011, appellant and others were at the home where she and her parents lived. S.S. was in the eighth grade at the time. The group ate dinner, and the adults were drinking champagne. Appellant told S.S.'s parents that he needed to go with her into the other room to discuss some ideas he had about her tennis game, and appellant took S.S. into an adjacent room, where they sat on a couch, with appellant sitting to the left of S.S.

***2** S.S. testified appellant mentioned something about her tennis but then "got kind of sidetracked and started rambling," and "after a while he started to make sexually explicit comments and started touching me." She stated that after they talked for a while, appellant touched S.S.'s breasts, her genitals, and began open-mouth kissing her hand while saying a variety of dirty things.[3] S.S. testified appellant reached out, grabbed and squeezed her breasts with his hands over her clothes, and "reached over with his hand and laid it over my vagina and started pressing and massaging" over her clothing.

3 Among other comments, he asked S.S. whether she was a lesbian, how many fingers she uses when she masturbates, whether she "ever had a man with foreskin," and whether she had "ever been kissed by a real man." After asking the latter question, he began French kissing her left hand and at one point also tried to kiss her neck. He also said he loved her, would never do anything to hurt her, and told her, "I don't want to end up in prison with my shit on the ceiling."

S.S. also testified about another incident in which appellant touched her genitalia over her clothes. She testified this happened in appellant's apartment, where she, appellant, and other tennis students were at the time. She testified that after the other students left the room, as appellant and S.S. sat side-by-side on his couch, watching videos for tactical purposes, appellant "briefly slid his hand over, touched my genitalia and said I'm sorry, and quickly removed his hand" and "just briefly touched and pressed and then lifted up and moved back to where he was." S.S. believed appellant "said something along the lines of, 'I'm sorry, it was an accident.' " S.S. stated that before this, the two were sitting still and that nothing was going on which would have caused this to happen accidentally.

In terms of the timing of the two genitalia-touching events (one charged, one extraneous), S.S. stated on direct examination that the incident in his apartment happened during the summer but she did not recall whether this was before or after the charged incident at Christmas. On cross-examination, she stated she believed the Christmas incident occurred first, in 2011, but was not sure, so she could not say whether the incident in appellant's apartment happened in summer 2011 or summer 2012. She later agreed on cross-examination that the first specific instance

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of sexual misconduct by appellant that she experienced was during Christmas of 2011.

Appellant's counsel did not object to S.S.'s extraneous-offense evidence during S.S.'s testimony and received no running objection to it before she testified.[4]

4 Also, during counsel's discussions with the court outside the presence of the jury, defense counsel affirmatively indicated at least twice that he had no objection to S.S.'s extraneous-offense evidence, stating, following the State's proffer of it, "I have no objection to that, but I would like an instruction from the Court to the jury when they get there –" and later stating, "[W]e had not objected to the 404(b) material dealing with [S.S.], but we had objected to and asked for a hearing before about the 404(b) material dealing with [N.H.] and [S.T.]." N.H. and S.T. were two of appellant's other female tennis students, and their extraneous-acts evidence is at issue in this appeal.

After the State rested, appellant called other witnesses. In addition to recalling S.S.'s mother, who had testified in the State's case-in-chief, appellant also testified and called three other witnesses, who generally denied seeing or hearing appellant engage in certain activity or make certain comments to S.S.

***3** On direct-examination, appellant denied ever touching S.S. on her genitals or breasts on December 24, 2011, or at any other time, denied being alone with S.S. on December 24 or 25, 2011, and denied making certain statements and engaging in other activities that S.S. had testified about. On cross-examination, appellant admitted being at S.S.'s home on December 24, 2011, admitted having dinner there and consuming sparkling wine, and agreed there is "a certain line that has to be in place between an instructor and student." Appellant testified he always kept that line between him and his students.

Not long after that testimony, the prosecutor asked to approach the bench, and an off-the-record discussion occurred. The court then told the jury:

> Members of the jury, I'm going to give you an instruction. You'll see a similar instruction in the jury charge. The instruction will be as follows: You are going to hear testimony consisting of alleged extraneous conduct. By extraneous conduct, I mean conduct that is something in addition to those acts that are charged in the indictments pending in this case alleged to have been committed by the defendant.
>
> You are not to consider it unless you first believe beyond a reasonable doubt that those extraneous matters, if any were committed, were committed by the defendant. And even then, even if you believe them beyond a reasonable doubt, you are only to consider them for their stated offered purpose, which is to show the defendant's motive, to show what his intent is, to show a lack of accident or a lack of mistake or to rebut a defensive theory.
>
> You may also consider it only if you believe it beyond a reasonable doubt as it relates to the relationship between the complaining witness in this case and the defendant.
>
> With that in mind, Mr. Capetillo [referring to the prosecutor], you may proceed.
>
> And please let the record reflect that the Court is going to mark this spot on the record for an opportunity to discuss matters outside the presence of the jury with both sides.

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The prosecutor then asked appellant again about the line that should exist between an instructor and student, and while appellant agreed he had "crossed that line," he denied ever doing so with S.S. or S.T., another of his female students.[5]

5 However, later during his cross-examination, he testified he "was always appropriate with his minor students" but stated he "did have an inappropriate relationship with [N.H.]." N.H. refers to the witness's initials before she was married, when her initials became N.S. We refer to her as N.H., consistent with most of the references to her in the record.

Appellant answered several questions about other students, including female students S.T. and N.H., whose extraneous-acts evidence is at issue here. Appellant's counsel did not object to most of these questions, and appellant denied engaging in some, but not all, of the activities that S.T. and N.H. would later testify to on rebuttal. As the prosecutor questioned appellant regarding N.H., the trial court sustained appellant's objection to a question regarding appellant's marriage at the time, instructed the jury to disregard the question, and repeated the jury instruction regarding extraneous acts per a request by appellant's counsel.

Both sides called various witnesses in rebuttal, and S.T. and N.H. were among the witnesses the State called. In addition to other matters that each testified to that appellant does not complain about here (and that we therefore do not discuss), S.T. and N.H. both testified about appellant touching their bodies while they were his tennis students. For S.T., appellant complains that the State produced evidence that appellant had allegedly given her "massages that included him rubbing her buttocks."[6] For N.H., appellant complains that the State produced evidence that appellant allegedly "engaged in consensual sex acts with [N.H.], another of his tennis students, shortly before and after her eighteenth birthday, but while he was married."[7] Appellant's counsel did not request a limiting instruction when S.T. and N.H. testified about these matters.

6 On page thirty-three of his principal brief, appellant discusses the evidence regarding S.T. and N.H. about which he complains on appeal, describing their testimony as quoted above. He cites three specific pages in the record for S.T.'s testimony. On those pages, S.T. testified about these massages and the context in which they occurred, stating that they occurred in appellant's apartment, where appellant took her to rest after S.T. had been playing tennis from early morning until around noon. S.T. testified that initially, appellant would talk to her about how her body was feeling while they were on the courts, and she stated he would "rub out my knots or something on the court" at first, but over the summer, he would then tell her they would "work on that when we get back to the house." She described the massages in the apartment as including him "massaging my butt," initially over her shorts but also under her shorts on a couple of occasions. S.T. also testified that during these massages, he would make comments about her body that made her uncomfortable, that no other students were there, and that appellant had no roommates at the time.

7 Appellant cites to ten specific pages from the record when discussing the evidence regarding N.H. about which he complains, none of which include N.H.'s specific testimony. Instead, the pages to which he cites refer to five pages of appellant's cross-examination, two pages from appellant's redirect-examination, and three pages of his ex-wife's direct-examination by the State. Throughout most of those ten pages, appellant's counsel never objected, and that testimony is not what appellant complains about in his issues on appeal. Though he does not cite to the specific pages containing N.H.'s testimony about appellant's physical contact with her, the record reflects that N.H. testified about various conduct by appellant while N.H. was his tennis student, including that appellant talked to her about personal matters unrelated to tennis instruction, then kissed her and touched her genitals, and that they engaged in sexual intercourse after her eighteenth birthday. When appellant testified, he stated he began coaching N.H. when she was

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> seventeen and one-half years old, admitted to touching and penetrating N.H.'s vagina and to having her touch his penis, but testified this did not occur when she was seventeen. He also admitted that he and N.H. had a sexual relationship and stated, "[W]e went all the way pretty much the first time or second time."

***4** After both sides closed, the court read its charges to the jury, which included the following instructions:

> You are instructed that you may not consider the defendant's commission of crimes, wrongs, or acts not alleged in the indictment, unless you first find and believe from the evidence beyond a reasonable doubt that the defendant committed such crimes, wrongs, or acts. Even then, you may only use that evidence for the limited purpose for which it was admitted, as instructed below.
>
> You are instructed that if there is any evidence before you in this case regarding other crimes, wrongs, or acts committed by the defendant against [S.S.] you may consider such evidence for its bearing on relevant matters, including the state of mind of the defendant and [S.S.], and the previous or subsequent relationship between the defendant and [S.S.].
>
> You are instructed that if there is any evidence before you in this case regarding the defendant having committed other crimes, wrongs, or bad acts, you may consider such evidence only in determining the motive, opportunity, intent, absence of mistake, lack of accident, or to rebut a defensive theory, and for no other purpose.

Following deliberations, the jury found appellant guilty of both charges and sentenced appellant to confinement in TDCJ's Institutional Division for nine years in Case No. F15-50349, three years in Case No. F15-50350, and a $10,000 fine in each of the two cases.

The trial court entered judgments which were consistent with the jury's verdicts and which indicated the sentences would run concurrently. The judgments also ordered appellant to pay court costs of $599 in each case. The judgments did not indicate that appellant was required to register as a sex offender or indicate S.S.'s age at the time of the offenses.

Following entry of the judgments, appellant filed motions for new trial, which were overruled by operation of law. Appellant also filed timely notices of appeal.

Analysis

Evidence of Extraneous Offenses or Bad Acts by Appellant

In his first and third issues, appellant argues the evidence of appellant's extraneous offenses or bad acts involving S.S., S.T. and N.H. should have been excluded for prejudice and confusion under rules 403, 404(b), and 406 of the rules of evidence (first issue) and because admission of such evidence violated his right to due process (third issue). In his second issue, he argues S.S.'s extraneous-offense evidence of appellant's other touching of her genitalia was improper under Article 38.37 of the code of criminal procedure. The State argues appellant failed to preserve error in certain respects and that, in any event, no error occurred.

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1. Standard of Review

We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). A trial court abuses its discretion if its ruling falls outside the zone of reasonable disagreement. *Id.* As long as the ruling is in the "zone of reasonable disagreement," we will affirm. *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009).

2. Appellant's Failure to Preserve Error on Various Issues

***5** Appellant complains about the admission of S.S.'s extraneous-offense evidence in his first, second, and third issues, but as noted before, he failed to object to this evidence below. Thus, he failed to preserve error for our review on those issues as they concern S.S.'s testimony, and we do not address those issues here. *See* Tex. R. App. P. 33.1(a)(1); *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002) (the issue under rule 33.1 is "whether the complaining party on appeal brought to the trial court's attention the very complaint that party is now making on appeal") (citing *State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998)).

Appellant also complains about the admission of S.T.'s and N.H.'s testimony in his first and third issues, but his objections below were limited to rule 404(b) and rule 403 grounds and did not include any objections based on rule 406. Thus, appellant failed to preserve error on the rule 406 arguments he raises in his first and third issues, and we do not address those here. *See* Tex. R. App. P. 33.1(a)(1); *Martinez*, 91 S.W.3d at 336. Thus, because appellant failed to preserve error on these issues, we overrule appellant's first issue as it relates to S.S.'s testimony and as it relates to his rule 406 arguments concerning S.T.'s and N.H.'s testimony, and we overrule appellant's second and third issues in their entirety.

3. S.T.'s and N.H.'s Testimony and Rules 404(b) and 403

This leaves us with appellant's first issue regarding S.T.'s and N.H.'s testimony and his arguments that the evidence should have been excluded under rules 404(b) and 403. Though appellant did not specifically mention rule 403 below, he argued that S.T.'s and N.H.'s testimony was much more prejudicial than it was probative, thus raising rule 403 issues for the trial court's consideration. *See* Tex. R. Evid. 403 (among other reasons, court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice and confusing the issues).

In addition to objecting below, appellant also obtained an adverse ruling regarding this evidence. Before S.T. and N.H. testified, the Court stated:

> THE COURT: All right. The Court is most persuaded that the evidence that was proffered by the State that the questions they wanted to ask on cross-examination will be relevant to establish what the defendant's intent was, what his motive was, what his opportunities were to commit offenses like this, and also to eliminate in their mind the possibility that this was accidental contact or accidental touching, and also to rebut an impression that's been put before this jury

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that the conduct between the defendant as the coach and the group of students that he had was always towing [sic] the line of the proper coaching[-]student relationship.[8]

8 This statement was made during a recess in appellant's testimony, during a time when the court heard, outside the presence of the jury, the parties' arguments regarding the admissibility of S.T.'s and N.H.'s evidence under rule 404(b) of the rules of evidence and N.H.'s evidence under Article 38.37 of the code of criminal procedure. *See* Tex. Code Crim. Proc. art. 38.37; Tex. R. Evid. 404(b). Once the hearing concluded and trial resumed, appellant's counsel continued his redirect-examination of appellant and then rested after appellant's testimony concluded. The State then called S.T., N.H., and others to testify in rebuttal.

Thus, we consider whether the trial court erred under rules 404(b) or 403 in admitting S.T.'s and N.H.'s extraneous-acts evidence here.

***6** Rule 404(b)(1) prohibits admission of evidence of crimes, wrongs, or other acts to prove a person's character in order to show that on a particular occasion the person acted in conformity with a bad character. *See* Tex. R. Evid. 404(b)(1); *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). However, such evidence may be admissible for other purposes, such as to show proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *See* Tex. R. Evid. 404(b)(2); *Devoe*, 354 S.W.3d at 469; *De La Paz*, 279 S.W.3d at 343 (rule 404(b)(2) is illustrative; its exceptions are neither collectively exhaustive nor mutually exclusive).

Extraneous-offense evidence may also be admissible to rebut defensive theories if a party "opens the door" to the evidence by leaving a false impression with the jury in a manner inviting the opposing party to respond. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (defensive theory raised in cross-examination opened door to extraneous-offense evidence); *Dabney v. State*, 492 S.W.3d 309, 318 (Tex. Crim. App. 2016) (defensive theory raised in voir dire and opening statement opened door to extraneous-offense evidence). When a witness makes a broad statement of good conduct or character directly relevant to the offense charged, an opponent may offer extrinsic evidence rebutting the statement. *See Daggett v. State*, 187 S.W.3d 444, 453 n.24 (Tex. Crim. App. 2005).

Here, by the time the court ruled on the State's proffered testimony by S.T. and N.H., appellant's counsel had told the jury that "maybe [S.S. is] the best actress in the world," that what S.S. and her parents were saying "isn't true," that there was "bad blood" between appellant, S.S., and S.S.'s parents, and that "[t]hese people are just lying to you." Also, in addition to suggesting S.S. was fabricating these allegations, appellant's counsel had advanced a defensive theory through his questioning of various witnesses that appellant lacked the opportunity or intent to touch S.S. as she alleged and that appellant maintained a professional instructor-student relationship with S.S.

Under these circumstances, considering the similarities between the alleged touching and the relationships between appellant and S.S., S.T., and N.H.—including that all three were tennis students of appellant's within the same or similar time period and that all had been touched by appellant on typically private parts of their bodies during or in relation to their

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tennis instruction—we conclude the trial court did not abuse its discretion in overruling appellant's rule 404(b) objections and allowing S.T.'s and N.H.'s testimony. *See* Tex. R. Evid. 404(b); *Bass v. State*, 270 S.W.3d 557, 562–63 & n.7 (Tex. Crim. App. 2008) (affirming trial court's decision to allow evidence under rule 404(b) of pastor's other sexual assaults of girls in church office); *Williams*, 531 S.W.3d at 919–20 (defensive theory raised in cross-examination opened door to extraneous-offense evidence); *Cornelious v. State*, No. 05-18-00274-CR, 2019 WL 1236409, at *3–5 (Tex. App.—Dallas March 18, 2019, no pet.) (mem. op., not designated for publication) (affirming court's admission of extraneous evidence over rule 404(b) objections where court could reasonably conclude evidence rebutted defensive theory of fabrication).

Next, we consider whether the court abused its discretion in allowing S.T.'s and N.H.'s testimony under rule 403. *See* Tex. R. Evid. 403. Even if evidence would otherwise be allowed under rule 404, it may be excluded under rule 403 if the probative value of the evidence "is substantially outweighed by its potential for unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." *See id.*

***7** In making a rule 403 determination, the trial court must balance (1) the inherent probative value of the evidence and (2) the State's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency to confuse or distract the jury from the main issues, (5) any tendency to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or be needlessly cumulative. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006). In practice, these factors may blend together. *Id.* at 642.

We presume the trial court applied the balancing test unless the record affirmatively shows otherwise. *See Rojas v. State*, 986 S.W.2d 241, 250 (Tex. Crim. App. 1998). We also presume the probative value of relevant evidence substantially outweighs the danger of unfair prejudice from admitting the evidence. *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999). We will reverse a trial court's rule 403 determination "rarely and only after a clear abuse of discretion." *Id.*

Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Gallo v. State*, 239 S.W.3d 757, 762 (Tex. Crim. App. 2007). Rule 403 envisions exclusion of evidence only when there is a "clear disparity between the degree of prejudice of the offered evidence and its probative value." *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009). In a "he said, she said" case involving sexual assault, rule 403 should be used "sparingly" to exclude relevant, otherwise admissible evidence that might bear on the credibility of the defendant or complainant. *Id.* at 562.

Here, we conclude that the trial court, after balancing the various rule 403 factors, could have reasonably concluded that the probative

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value of S.T.'s and N.H.'s testimony and the State's need for it were not substantially outweighed by prejudice or confusion as appellant argues or by the other dangers specified in the rule. Considering the record here, including the lack of third-party eyewitnesses or any physical evidence, the trial court could have reasonably concluded that the first two *Gigliobianco* factors weighed heavily in the State's favor and were not substantially outweighed by the remaining four factors. On the third factor, while extraneous acts involving sexual offenses against children are inherently inflammatory,[9] the potential for an improper decision was lessened by at least two facts, including that the charged events involving S.S. were either more or comparably egregious to the extraneous events involving S.T. and N.H., and by the trial court instructing the jury regarding the proper use of the extraneous act evidence. *See Robisheaux v. State*, 483 S.W.3d 205, 220 (Tex. App.—Austin 2016, pet. ref'd) (potential for decision on an improper basis reduced when extraneous acts no more serious than allegations forming basis of indictment); *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998) (en banc) (we "generally presume the jury follows the trial court's instructions in the manner presented") (citations omitted). Thus, in light of the record here, the trial court could have reasonably concluded that if the third factor weighed against admission, it did so only slightly.

9 *See Montgomery v. State*, 810 S.W.2d 372, 397 (Tex. Crim. App. 1990) (en banc) ("Both sexually related misconduct and misconduct involving children are inherently inflammatory.").

***8** As to the fourth and fifth factors, we conclude the evidence was unlikely to confuse or distract the jury from the main issues and was unlikely to leave the jury ill-equipped to evaluate its probative force, particularly in light of the court's instructions. Finally, as to the sixth factor, the presentation of the extraneous evidence from S.T. and N.H. did not take an inordinate amount of time or merely repeat evidence already submitted. *See Kimberlin*, 2019 WL 1292471, at *4 (extraneous events testimony from two witnesses encompassed a total of forty-eight pages of a two-volume record of the guilt-innocence phase).

Thus, we conclude that in balancing the applicable factors, the court could have reasonably concluded that the probative value of S.T.'s and N.H.'s extraneous-acts evidence was not substantially outweighed by unfair prejudice or confusion of the issues, and because the evidence was thus within the zone of reasonable disagreement, no abuse of discretion occurred under rule 403. *See* Tex. R. Evid. 403; *Gigliobianco*, 210 S.W.3d at 641–42 (listing factors to consider and determining court could have reasonably concluded factors weighed in favor of admitting evidence of defendant's breath test results over his rule 403 objection); *Cornelious*, 2019 WL 1236409, at *5 (affirming court's admission of extraneous evidence over rule 403 objections where court could reasonably conclude danger of unfair prejudice did not substantially outweigh its probative value).

We overrule appellant's first, second, and third issues.

Alleged Charge Error

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Before the jury began deliberating in the guilt/innocence phase, the trial court read the court's charges to the jury, which included limiting instructions on the purposes for which they could consider any evidence of appellant's having committed other crimes, wrongs, or bad acts. We include the text of those limiting instructions above in our "Background" section.

In his fourth issue, appellant argues the trial court erred in giving those instructions because they included purposes that, in his view, were not relevant to the case, including the purpose of rebutting a defensive theory, and that this error caused him sufficient harm to justify reversal.

The State argues that no error occurred because, even if the limiting instructions listed more purposes for S.T.'s and N.H.'s evidence than they should have, the court was not required to provide a more limited instruction because appellant failed to request a limiting instruction at the time S.T.'s and N.H.'s evidence was admitted and because the jury could have treated as surplusage any additional reasons that did not apply here. The State also argues that even if error occurred, reversal is not warranted because appellant was not sufficiently harmed.

We review all alleged charge error on appeal, regardless of error preservation, considering first whether error occurred, and if so, whether sufficient harm occurred to justify a reversal, an analysis that depends on whether error was preserved. *See Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012) ("The issue of error preservation is not relevant until harm is assessed because the degree of harm required for reversal depends on whether the error was preserved.") (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003)). If charge error has occurred and appellant preserved error on that issue below, we consider whether "some" harm occurred, but if unpreserved charge error occurred, we will reverse only when the error results in "egregious" harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g).

***9** Based on the facts here, we conclude no charge error occurred, and even if it did, appellant has failed to show that he suffered either "some" or "egregious" harm based on this record. Because appellant failed to request a limiting instruction at the time S.T.'s and N.H.'s evidence was introduced, the trial court was under no duty to provide a limiting instruction to the jury regarding that evidence, and the evidence was admitted for all purposes. *See Delgado*, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007) ("Once evidence has been admitted without a limiting instruction, it is part of the general evidence and may be used for all purposes.") (citations omitted); Tex. R. Evid. 105 (party may claim error in a ruling to admit evidence admissible for one purpose but not another "only if the party requests the court to restrict the evidence to its proper scope and instruct the jury accordingly."). In *Delgado*, when analyzing whether a trial judge should have given the jury an instruction at the guilt phase regarding the State's burden of proof for extraneous offenses, the court stated:

> Even if a limiting instruction on the use of an extraneous offense would have been

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> appropriate here under Rule 404(b), the trial judge had no duty to include one in the jury charge for the guilt phase because appellant failed to request one at the time the evidence was offered. Because the trial judge had no duty to give *any* limiting instruction concerning the use of an extraneous offense in the guilt-phase jury charge, it naturally follows that he had no duty to instruct the jury on the burden of proof concerning an extraneous offense.

Delgado, 235 S.W.3d at 251.

Several of our sister courts have applied this reasoning to circumstances similar to those we face here and have found no charge error occurred regarding rule 404(b) limiting instructions when such instructions were not requested at the time the evidence was admitted. *See Hicks v. State*, No. 14-18-00794-CR, 2020 WL 3697614, at *8 (Tex. App.—Houston [14th Dist.] July 7, 2020, no pet. h.) (concluding trial court did not commit charge error by including the limiting instruction it provided when appellant did not request limiting instruction at time evidence was admitted; court did not reach question of harm because no error occurred); *Harmel v. State*, 597 S.W.3d 943, 960–61 (Tex. App.—Austin 2020, no pet.) (overruling claim of alleged charge error involving failure to give limiting instruction on extraneous offenses when appellant failed to request such instruction at time evidence was admitted; court did not consider issue of harm); *Ryder v. State*, 514 S.W.3d 391, 402–03 (Tex. App.—Amarillo 2017, pet. ref'd) (concluding court did not err by failing to instruct jury on what extraneous evidence "could not be used for" when defendant did not request limiting instruction at time evidence was introduced; court did not consider issue of harm); *Irielle v. State*, 441 S.W.3d 868, 880 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (concluding no charge error occurred when defendant failed to request limiting instruction at time extraneous evidence was admitted and explaining its decision was not due to failure to preserve error but was instead because extraneous acts evidence was admitted for all purposes—including character conformity—when appellant failed to request a limiting instruction at time evidence of extraneous acts was admitted and thus imposed no duty on trial court to give any limiting instructions in the jury charge); *Salazar v. State*, 330 S.W.3d 366, 367–68 (Tex. App.—San Antonio 2010, no pet.) (overruling appellant's claim of charge error regarding evidence of extraneous acts where appellant failed to request limiting instruction at time such evidence was admitted; court did not address question of harm).

Consistent with *Delgado* and the decisions cited above from our sister courts, because appellant failed to request a limiting instruction regarding S.T.'s and N.H.'s evidence of appellant's extraneous acts at the time their evidence was admitted, their evidence was admitted for all purposes, imposing no duty on the trial court to provide any limiting instructions in the court's charge to the jury, and leading us to conclude that the court did not err in its instructions to the jury regarding that evidence. *See* Tex. R. Evid. 105; *Delgado*, 235 S.W.3d at 251; *Hicks*, 2020 WL 3697614, at *8; *Harmel*, 597 S.W.3d at 960–61; *Ryder*, 514 S.W.3d 402–03; *Irielle*, 441 S.W.3d at 880; *Salazar*, 330 S.W.3d at 367–68. We overrule appellant's fourth issue.

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State's Cross-Issue

***10** In a single cross-issue, the State requests that we modify the judgments to reflect that appellant is required to register as a sex offender and that S.S. was thirteen years old at the time of the offenses. Appellant did not address the State's cross-issue in his reply brief.

We may modify the trial court's judgment to make the record speak the truth when we have the necessary information to do so. Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (en banc) (refusing to limit the authority of the courts of appeals to reform judgments to only those situations involving mistakes of a clerical nature); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd).

In both judgments, appellant was convicted of indecency with a child by sexual contact under section 21.11(a)(1) of the penal code, an offense which subjects a person convicted of the offense to the sex offender registration requirements of chapter 62 of the code of criminal procedure. *See* Tex. Penal Code § 21.11(a); Tex. Code Crim. Proc. art. 62.001(5)(A), 62.051(a); *Crabtree v. State*, 389 S.W.3d 820, 825 (Tex. Crim. App. 2012). When a person is convicted of an offense for which registration for a sex offense is required under chapter 62, the judgment must include a statement that the registration requirements of that chapter apply to the defendant and a statement of the age of the victim. Tex. Code Crim. Proc. art. 42.01, § 1(27).

The judgments, however, do not indicate the sex offender registration requirements apply to appellant and do not reflect S.S.'s age at the time of the offenses. Accordingly, we sustain the State's cross-issue and modify the judgments to reflect that Anastassov is required to register as a sex offender and that S.S. was thirteen years old at the time of the offenses.

Additional Issue Regarding Concurrent Fine and Duplicative Costs

While neither side raises this issue, we also note that the judgments imposed identical fines of $10,000 and identical court costs of $599, which, as we explain below, constituted an illegal sentence in Case No. F-1550350-V because it was inconsistent with various statutes governing multiple offenses tried together in a single proceeding.

"A trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (en banc) ("There has never been anything in Texas law that prevents *any* court with jurisdiction over a criminal case from noticing and correcting an illegal sentence.") (emphasis in original). Thus, we modify the judgment in Case No. F-1550350-V to ensure compliance with applicable law.

Section 3.03 of the penal code provides, in part:

> (a) When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each

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offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.

(b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction of:

....

(2) an offense:

***11** (A) ... under Section ... 21.11 ... committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section....

Tex. Penal Code § 3.03. Here, while section 3.03(b)(2)(A) would have allowed appellant's sentences to run consecutively had the court made that determination, the statute does not require it, and the trial court indicated that appellant's sentences would run concurrently. Section 3.03(a)'s concurrent sentences provision "applies to the entire sentence, including fines." *State v. Crook*, 248 S.W.3d 172, 177 (Tex. Crim. App. 2008). Additionally, "[i]n a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant." Tex. Code Crim. Proc. art. 102.073(a).[10]

10 Although section 102.073 did not become effective until September 1, 2015, the statute applies to offenses committed before that date when the fees or costs are imposed after that date. *See Shelton v. State*, Nos. 05-17-00900-CV, 05-17-00901-CV, 05-17-00902-CV, 05-17-00903-CV, 2019 WL 244474, at *3 n.5 (Tex. App.—Dallas, Jan. 17, 2019, no pet.) (mem. op., not designated for publication) (citing Act of June 19, 2015, 84th Leg., R.S., ch. 1160, § 2, 2015 Tex. Sess. Law. Serv. Ch. 1160 (S.B. 740) (codified as Tex. Code Crim. Proc. art. 102.073)).

Here, the trial court conducted a single proceeding for multiple offenses alleged to have been committed on or about December 24, 2011, and the trial court entered judgments in 2019 which imposed $10,000 fines and $599 in court costs in both cases. Because the sentences run concurrently and involve multiple offenses tried together in a single proceeding, the trial court could not assess multiple fines or duplicate costs in the two judgments. *See* Tex. Penal Code § 3.03(a); Tex. Code Crim. Proc. art. 102.073(a). Accordingly, we modify the judgment in Case No. F-1550350-V by deleting the $10,000 fine and the $599 in court costs. *See* Tex. Penal Code § 3.03(a); Tex. Code Crim. Proc. art. 102.073(a); Tex. R. App. P. 43.2(b); *Bigley*, 865 S.W.2d at 27–28, 31; *Asberry*, 813 S.W.2d at 529–30.

Conclusion

For the foregoing reasons, we affirm the trial court's judgments, as modified below:

1) The judgments in Case No. F1550349-V and Case No. F-1550350-V are both modified to reflect that appellant is required to register as a sex offender and that S.S. was thirteen years old at the time of the offenses; and

2) the judgment in Case No. F-1550350-V is modified to delete the $10,000 fine and the

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$599 in court costs imposed on appellant, as those are concurrent with the fine or duplicate the costs imposed in Case No. F-1550349-V.

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